U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 2, 1995 **FMLA-60**

Dear ***Name****,

This is in response to your letter forwarding correspondence from ***Name****, concerning the Family and Medical Leave Act of 1993 (FMLA). ***Name**** expresses concern with FMLA's definition of serious health condition, particularly chronic conditions, as summarized in an association bulletin, and its impact on his employer's absence control program. The definition of serious health condition was set forth in FMLA's final regulations, published in the Federal Register on January 6, 1995 and effective on April 6, 1995.

In enacting the law, Congress stated in Section 2, that there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods. Congress also stated in Section 2 that it is the purpose of FMLA to entitle employees to take reasonable leave for medical reasons. Pursuant to Sections 101(11)(A) and (B) , a serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.

The legislative history further refines the intent of Congress regarding the meaning of "serious health condition." In this context,".... serious health condition is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery.(emphasis added) With respect to a child, spouse or parent, the term serious health condition is intended to cover conditions or illnesses that affect the health of the child, spouse or parent such that he or she is similarly unable to participate in school or in his or her regular daily activities."

In developing the regulation's definition of a serious health condition, the Department relied upon the statute and the legislative history. Where inpatient care is not involved, the regulations require the absence from work, or from school or incapacity in performing other daily activities to be greater than three calendar days and to include continuing treatment by (or under the supervision of) a health care provider. Continuing treatment includes (i) two or more visits to a health care provider; (ii) two or more treatments by a health care provider on referral from, or under the direction of, a health care provider; or (iii) a single visit to a health care provider that results in a regimen of continuing treatment under the supervision of the health care provider as for example, a course of medication or therapy to resolve the health condition.

Because the statute (Section 102 (b)) permits intermittent leave or leave on a "reduced leave schedule" in cases of medical necessity, it is also clear that the Act contemplates that employees would be entitled to FMLA leave in some cases because of doctor's visits or therapy due to a condition that need not be incapacitating at that point. The legislative history explains that to receive treatment for early stage cancer I to receive physical therapy after a hospital stay or because of severe arthritis, etc., or for prenatal care are covered by the Act.

The final regulations clarify the interim final regulations' definition of serious health condition for chronic conditions and pregnancy. It is recognized that certain chronic conditions, such as asthma and diabetes, that continue over extended periods of time, often without affecting day-to-day ability to work or perform other activities, may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, the appropriate and effective course of action may be to stay home and to self-treat. The definition has been revised to cover such chronic conditions as serious health conditions under FMLA, even when the individual episodes of incapacity are not of more than three days duration. Neither the interim regulations nor final regulations require a visit to the health care provider for each absence associated with a chronic serious health condition. (See Regulations 29 CFR 825.114)

Name* is correct in stating that FMLA leave may not be the basis of disciplinary action. Pursuant to Section 105 of the statute and Regulations 29 CFR 825.220(c), employers are prohibited from

discriminating against employees who use FMLA leave. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

In passing FMLA, Congress also stated that the purposes of the Act were to be accomplished "in a manner that accommodates the legitimate interests of employers." Employees are required to consult with employers prior to the scheduling of planned medical treatment where intermittent FMLA leave will be used in order to schedule such treatment, if possible, so that it will not unduly disrupt the employer's operations. Employers also may require a medical certification from the employees, or the employee's immediate family member's treating physician, which can provide medical facts about the condition and the duration of treatment and recovery. Moreover, the employer may request certification at some later date if the employer has reason to question the appropriateness of the leave or its duration. If the employer questions the validity of the initial medical certification, the employer may require the employee to obtain a second medical opinion, and possibly a third if necessary, at the employer’s expense. Employers also have the right to request recertification in the case of pregnancy, chronic conditions, or permanent/ long-term conditions under the supervision of a health care provider every 30 days or at any reasonable interval based on the circumstances of the case. (See 29 CFR 825.305 -308)

If the employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave for a serious health condition, the employer may delay FMLA leave until the employee submits the certificate. If the employee is unable to produce the medical certification, the leave is not FMLA leave and the employee is not protected by the Act. (See 29 CFR 825.301(b)(ii) and 312(b) .) While we appreciate ***Name**** concerns, we believe that the regulatory definition of a serious health condition is consistent with the statute and legislative history. We also believe that the regulations provide employers the means to deter employees from improperly using FMLA leave. A copy of the final regulations is enclosed for ***Name**** information.

If I may be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

cc: Washington, D.C., Office

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*